

**TC Ravenswood, LLC v National Union Fire Ins. Co.
of Pittsburg Pennsylvania**

2014 NY Slip Op 32776(U)

October 21, 2014

Supreme Court, New York County

Docket Number: 400759/2011

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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TC RAVENSWOOD, LLC,

Plaintiff,

-against-

Index No. 400759/2011

Motion seq. no. 26

DECISION AND ORDER

NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH PENNSYLVANIA
(a/k/a AIG, n/k/a Chartis), ASSOCIATED
ELECTRIC & GAS INSURANCE SERVICES
LIMITED, ACE INA INSURANCE, AND ARCH
INSURANCE COMPANY, and FACTORY
MUTUAL INSURANCE COMPANY,

Defendants.

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By notice of motion dated May 28, 2014, defendant Factory Mutual Insurance Company (FMIC) moves for leave to reargue two decisions filed on May 2, 2014, denying FMIC's motions for certain discovery. TC Ravenswood, LLC (TransCanada) and Marsh Canada Limited and Marsh & McLennan Companies, Inc. (collectively, Marsh) oppose.

In the first decision (motion sequence no. 23), I denied FMIC's motion for the issuance of an open commission to depose Jeremy Palmer. I found that although Palmer, a former Marsh employee, "may have relevant information, in light of FMIC's failure to controvert TransCanada's allegations that other employees with similar or more knowledge of the same events and communications have already been deposed, FMIC has not demonstrated that the

commission is material and necessary.” (NYSCEF 586).

In the second decision (motion sequence no. 24), I denied FMIC’s motion for an order compelling Transcanada and Marsh to produce for depositions Marsh employees Timothy Gale, Darrell Rose, and Donald Schumbert. I found that these employees were non-parties, as FMIC had failed to establish that Marsh was Transcanada’s agent at the time it sought the depositions and was thus under Transcanada’s control. Therefore, as they resided outside of New York State, a commission or letters rogatory was required for their production, and Transcanada could not be compelled to produce them. (NYSCEF 587).

I. MARSH EMPLOYEE DEPOSITIONS

A. Contentions

FMIC argues that I overlooked or misapprehended the relevant facts when I found that Marsh was not Transcanada’s agent for the purpose of compelling the depositions, despite having found, in an earlier decision dealing with a dispute over the production of allegedly privileged documents, that Marsh was Transcanada’s agent. (NYSCEF 605).

Transcanada and Marsh deny that I overlooked or misapprehended any facts, and contend that aside from finding that Marsh was not Transcanada’s agent, I could also have denied the motion on the ground that the depositions were unnecessary. (NYSCEF 678).

B. Previous decision on privileged documents

In my decision dealing with whether specific Transcanada documents were privileged, I found, as pertinent here:

As [Transcanada’s] insurance policies at issue are complex, and TransCanada’s in-house counsel lacked the experience necessary to file a claim, TransCanada hired its broker, Marsh, to assist with the explication of the policies . . . After the insurance companies

denied the claims, Marsh helped negotiate a settlement with insurer Aegis, and developed a litigation strategy for the instant action. Marsh communicated with both outside and in-house counsel at TransCanada, and was forwarded communications and work product from counsel.

Privilege is not waived, however, if the third party is acting as an agent of the attorney or the client . . . Here, Marsh was specifically hired by TransCanada and its counsel to explain the complex insurance policies at issue for TransCanada and its counsel . . .

Marsh, acting as TransCanada's agent, was expected to maintain [certain] communications in confidence and it withheld subpoenaed documents at TransCanada's request.

(NYSCEF 377).

C. Analysis

FMIC previously made this argument, and does not show that I overlooked or misapprehended any facts or law. In any event, as I already held, the determination of whether an entity acts as an agent for the purpose of determining the existence of a privilege is irrelevant to whether an entity acts as an agent for the purpose of determining whether a deposition of the purported agent should be compelled. (*See eg Daimler AG v Bauman*, __ US __, 134 SCt 746 [2014] [one may be agent for some business purposes and not others; that one is agent for one purpose does not make her agent for every purpose]; *Sieger v Zak*, 60 AD3d 661 [2d Dept 2009] [to extent employee could be considered corporation's agent for certain purposes, he was not agent for purpose of making privileged communications]).

Moreover, it is undisputed that Gale's involvement in the matter began after the incident occurred, that the emails cited by FMIC as being relevant to Rose's knowledge involve other employees who have already been deposed, and that FMIC deposed several former employees of National Grid, the prior owner of Ravenswood, regarding past issues and claims with the facility.

FMIC has thus failed to establish that the three Marsh employees it wishes to depose possess personal knowledge of relevant issues which can not and has not been obtained from the deposed Marsh employees and other witnesses, who were more involved with the claim than the three other employees. (*See Gelda v Costco Wholesale Corp.*, 89 AD3d 1058 [2d Dept 2011] [plaintiff failed to sustain burden of demonstrating that defendant's already-deposed employee had insufficient knowledge or was otherwise inadequate]).

That the three employees may have additional information does not mean that the witnesses already deposed had insufficient knowledge or were otherwise inadequate. (*See Those Certain Underwriters at Lloyds, London v Occidental Gems, Inc.*, 41 AD3d 362 [1st Dept 2007], *aff'd* 11 NY3d 843 [2008] [witness not compelled to appear for deposition; testimony of deposed witnesses indicated that they had knowledge equivalent to that of requested witness related to material issue, and thus new witness did not possess non-duplicative material and necessary information]; *Rosado v A&P Food Store*, 26 Misc 3d 935 [Sup Ct, Westchester County 2009] [while plaintiff demonstrated that other employees had relevant knowledge, it failed to show that already-deposed employee had insufficient or inadequate knowledge]).

FMIC has also not explained the relevance to this insurance coverage dispute of Marsh employees' post-accident interpretation and understanding of the coverage, as the main issue here is whether the crack in the generator's rotor was present and/or known to Transcanada before it purchased insurance and whether defendants' insurance covers the claims at issue. The case cited by FMIC, *Ribacoff v Chubb Group of Ins. Co.*, 2 AD3d 153 (1st Dept 2003), is not on point. There, the court addressed a broker's pre-incident knowledge of whether the insured had purchased or requested certain coverage or intended to do so, and the issue was whether the

coverage was or should have been included in the policy.

Having deposed at least 24 fact witnesses, including three Marsh employees, FMIC has not met its burden of showing that additional depositions are necessary. While FMIC apparently wishes to depose every Marsh employee that had any involvement in the claim, no matter how small, it has not shown that it is entitled to do so.

II. PALMER COMMISSION

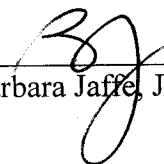
As FMIC advances the same arguments now that it advanced in its motion to compel, it fails to show that I overlooked or misapprehended any law or facts. A motion to re-argue may not “serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided.” (*Foley v Roche*, 68 AD2d 558, 567-568 [1st Dept 1979], *lv denied* 56 NY2d 507 [1982]; *V. Veeraswamy Realty v Yenom Corp.*, 71 AD3d 874 [2d Dept 2010] [same]).

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant Factory Mutual Insurance Company’s motion for leave to reargue is denied.

ENTER:



Barbara Jaffe, JSC

DATED: October 21, 2014
 New York, New York